Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 11 and 13	)	
of the Cable Television Consumer	)	
Protection and Competition Act of 1992	)	MM Docket No. 92-264
	)	
Horizontal and Vertical Ownership	)	
Limits, Cross-Ownership Limitations	)	
and Anti-trafficking Provisions	)	

COMMENTS OF TURNER BROADCASTING SYSTEM, INC. ON FURTHER NOTICE OF PROPOSED RULE MAKING

OF COUNSEL:

Bertram W. Carp
Turner Broadcasting System, Inc.
820 First Street, N.E.
Washington, D.C. 20004
202/898-7670

Bruce D. Sokler
Lisa W. Schoenthaler
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
202/434-7300

August 23, 1993

DOCKET FILE COPY ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 11 and 13	)	
of the Cable Television Consumer	)	
Protection and Competition Act of 1992	)	MM Docket No. 92-264
	)	
Horizontal and Vertical Ownership	)	
Limits, Cross-Ownership Limitations	)	
and Anti-trafficking Provisions	)	

**COMMENTS OF TURNER BROADCASTING SYSTEM, INC.
ON FURTHER NOTICE OF PROPOSED RULE MAKING**

Turner Broadcasting System, Inc. ("TBS"), by its attorneys, submits its comments in response to the Further Notice of Proposed Rule Making ("NPRM") in the above-captioned matter. TBS filed extensive comments in response to the initial Notice in this proceeding.[1/] As we said in our initial comments, this proceeding cannot be viewed in a vacuum, but only in conjunction with other sections of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") and their implementation. We will offer comments below on the Commission's tentative conclusions and questions regarding the channel occupancy limits under Section 11(c)(2) of the 1992 Cable Act. At the outset, however, TBS wishes to indicate that these comments are filed under the working assumption that our petition for clarification or partial reconsideration in the rate regulation proceeding

---

[1/]Comments of Turner Broadcasting System, Inc., filed February 9, 1993, in Notice of Proposed Rule Making and Notice of Inquiry, 8 FCC Rcd 210 (1992) ("TBS Comments").

will be favorably considered.[2/] Otherwise, the Commission will de facto have made ownership structures like those of TBS and others untenable.[3/]

COMMENTS ON CHANNEL OCCUPANCY LIMITS

In TBS's initial comments in this proceeding, we cautioned the Commission regarding the delicate balance, both as a constitutional and policy matter, between the various considerations involved in channel occupancy limits.[4/] In our initial comments, we urged the Commission not to further tilt the playing field in favor of broadcast networks and other programmers with which affiliated cable programmers directly compete. We demonstrated that the vertically-integrated cable networks subject to Section 613 are far smaller and less powerful than their competitors who are increasingly less regulated. We further indicated that the imposition of restrictive channel occupancy limits will harm TBS's ability to create innovative programming and hence the public.[5/]

[2/]Turner Broadcasting System, Inc., Petition for Clarification or Partial Reconsideration, In the Matter of Implementation of Sections of The Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket 92-266, filed June 21, 1993, appended hereto. See 47 C.F.R. § 76.922(d)(2)(vi); Report and Order and Further Notice of Proposed Rulemaking, MM Docket 92-266 at ¶ 252 (released May 3, 1993).

[3/]Under this scenario, just as if divestiture was required in this proceeding, TBS believes that the Commission would be obligated to issue tax certificates to permit divestiture, pursuant to Section 1071(a) of the Internal Revenue Code, 26 U.S.C. § 1071(a) (authorizing the Commission to issue tax certificates in connection with a sale or exchange of property where such sale or exchange is found by the Commission to be "necessary or appropriate to effectuate a change in a policy of, or the adoption of a new policy by, the Commission with respect to the ownership or control of radio broadcasting stations..."). This provision has been interpreted to include cable transactions. See, e.g., Issuance of Tax Certificates, 59 FCC 2d 91 (1976); John C. Foster, 40 R.R.2d 824, 825 (1977).

[4/]See generally TBS Comments.

[5/]Id. at 2-14.

Since those comments were filed in February, these points have been further demonstrated in the marketplace. Must carry itself cedes to broadcasters often up to 40% of activated channel capacity. Using retransmission consent as a weapon, broadcasters such as NBC, ABC, Fox, Tribune and others are successfully leveraging those statutory rights to start cable channels and capture further capacity on cable.[6] And since retransmission consent is an ongoing process, in future years more and more of this leverage will be used to broadcasters' competitive advantage. A great deal, therefore, has already been done to "jump start" competition to "vertically integrated" programmers like TBS. This proceeding should not have the effect of further disadvantaging companies such as ours.

Vertically integrated programmers like TBS, Discovery, BET, Family and others must be able to grow to survive in today's environment. Overly restrictive channel occupancy limits will unfairly hurt our company; they also will deprive consumers of important sources of new programming. In our case, for example, the Cartoon Network, Turner Movie Classics, and a domestic launch of CNN International all would be threatened.

In its recent NPRM, the Commission embraced some of our positions and conclusions, while expressly rejecting others and taking a different approach to certain

---

[6] See, e.g., "NBC, TW: We're Talking Channel," Daily Variety, August 18, 1993 at 1 (reporting on Time Warner's plans to launch NBC's still-in-development "America's Talking" in exchange for retransmission consent); "Viacom Will Add ESPN2 As Part of KGO Deal", The San Francisco Chronicle, August 14, 1993 at F3 (indicating that KGO (Channel 7) reached a deal pursuant to which the station would grant retransmission consent in exchange for Viacom's addition of ESPN2); Communications Daily, August 18, 1993 at 7 (reporting that Tribune Broadcasting would trade retransmission consent rights for its stations in exchange for cable carriage of the new TV Food Network); "Fox Channel adds six MSOs", Broadcasting, August 2, 1993 at 14 (noting that Fox and its affiliates are granting operators retransmission consent as part of deals involving carriage of the new Fox channel).

issues. We continue to adhere to the views that we articulated in our initial comments. We do recognize, however, that the Commission has attempted to accommodate those varying interests and to avoid turning the channel occupancy limits into a further straightjacket, constraining diversity or the public interest.

We offer specific comments on the following aspects of the Commission's proposals:

A. Application of Channel Occupancy Limits

The Commission correctly rejected arguments that the channel occupancy limit should apply to cable operators whether or not they are affiliated with the programmer.[7/] We believe even the Commission would admit that the First Amendment defense it posits[8/], with which we respectfully disagree, will not successfully justify imposing these limits on all cable systems nationwide.

B. The FCC Should Implement a System Based on Bandwidth

We agree that the Commission's regulations should attempt to keep up with, as opposed to immediately fall behind, the technological curve.[9/] As the industry moves to digital compression, the concept of what constitutes a channel is clearly evolving. We therefore support an approach under which channel occupancy limits would be calculated by counting each 6 MHz signal as a single unit and then by applying limits on the number of units that could be occupied by vertically integrated programming.[10/]

[7/] NPRM at ¶ 180.

[8/] Id. at ¶ 175 n.169.

[9/] Id. at ¶ 183.

[10/] Id. at ¶¶ 176, 183.

C. Calculation of Channel Capacity

We agree with the Commission's conclusion that all activated channels should be included in the calculation of a system's channel capacity.[11/] The Commission correctly rejected the punitive, unsupported proposals that broadcast must carry, PEG and leased access channels be excluded.[12/]

D. Attribution Standard

We frankly did not audition for the important role the Commission ascribes to TBS's advocacy of the broadcast attribution criteria[13/]. We do agree with the Commission's recognition of the distinction between the more narrowly tailored behavioral restraints of Section 19 of the 1992 Cable Act and the structural channel occupancy limits.[14/] The Commission is importantly correct in its belief that "a more flexible attributable standard [than the Section 19 standard] is appropriate to encourage continued investment in the development of new programming services."[15/]

[11/] Id. at ¶ 189.

[12/] Id. at ¶ 190; TBS Comments at 17.

[13/] NPRM at ¶ 201 n.195.

[14/] Id. at ¶ 198; TBS Comments at 17-18.

[15/] NPRM at ¶ 198.

E. Percentage Limitation

We recommended, and continue to recommend, a different approach to setting channel limits than the approach adopted by the NPRM.[16/] With reference to the approach tentatively adopted by the Commission,[17/] we observe that any reduction of the 40% limit would severely restrict the growth opportunities of vertically integrated programmers. Given the remedies provided in other sections of the 1992 Cable Act to prevent abuse of the vertical relationship, and given the dramatically increased leverage of program networks affiliated with broadcasting companies, any reduction would be inappropriate.

We agree with an exception to the occupancy limit adopted for services that are minority controlled or targeted to a minority audience.[18/] We do not believe, however, that the definition of "qualified programming minority source" in the leased access provisions of the Communications Act is broad enough for these purposes.[19/] To illustrate, TBS currently distributes a Spanish language version of CNN International outside the United

---

[16/]See TBS Comments at 14-15. Section 11(c)(2) directs the Commission to place a reasonable limit on the number of channels "that can be occupied by a video programmer in which a cable operator has an attributable interest" (emphasis supplied). Consistent with its obligation to execute the words of the statute itself, TBS urges the Commission to adopt an approach that establishes limits in terms of each video programmer. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982) (quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (when Congress' "will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive'").

[17/]NPRM at ¶¶ 198, 211.

[18/]Id. at ¶ 207.

[19/]47 U.S.C. § 532(i)(2). That section defines "qualified minority programming source" as a programming source "which devotes substantially all of its programming to coverage of minority viewpoints, or to programming directed at minority groups, and which is over 50% minority-owned."

States. We believe that such a service, if distributed in the United States, would be "targeted to a minority audience" and should be entitled to the same relief from the 40% limit as a service that fits the definition of 47 U.S.C. § 532(i)(2).

F. Local and Regional Networks

We agree with the Commission's proposal to exempt local and regional networks from the channel occupancy limits in order to encourage the development of local cable programming[20]. We believe that the Commission should define a "local and regional programming service" as "a video programming service which: (a) is marketed and distributed to viewers in a particular community, state or multi-state geographic region rather than nationwide; and (b) originates programming of particular interest to, or sports coverage of, teams located in or of particular interest to, that community, state or geographic region."

G. Miscellaneous Matters

Other aspects of the Commission's proposal also make logical sense and avoid legal or constitutional flaws. We think the Commission should establish a channel capacity threshold above which the channel occupancy limits should not apply.[21] Channel occupancy limits should be eliminated in any community where effective competition exists, **automatically**.[22] All existing vertical relationships should be grandfathered.[23] As we said in our initial comments, the limits should not be implemented in a way that would result

---

[20] NPRM at ¶ 219.

[21] Id. at ¶¶ 226-27.

[22] Id. at ¶¶ 231-32.

[23] Id. at ¶¶ 236-237.

in subscribers in certain jurisdictions losing access to programs they currently enjoy, particularly in the case of widely distributed and popular programming.[24/]

CONCLUSION

The Commission should ensure that its final implementation of the channel occupancy limits adhere to Congress's directive not to adopt limitations "which would impair the development of diverse and high quality video programming." 47 U.S.C. §533(f)(2)(G). To do so requires the Commission to adhere to its position that the channel occupancy limits be set at no less than 40% of all activated channels.

Respectfully submitted,

Bruce D. Sokler

Bruce D. Sokler
Lisa W. Schoenthaler
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
202/434-7300

OF COUNSEL:

Bertram W. Carp
Turner Broadcasting System, Inc.
820 First Street, N.E.
Washington, D.C. 20004
202/898-7670

August 23, 1993

D20014.3

[24/]TBS Comments at 17-19.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Jun 21 '93

In the Matter of	)	
	)	
Implementation of Sections of	)	
The Cable Television Consumer	)	MM Docket 92-266
Protection and Competition Act	)	
of 1992	)	
	)	
Rate Regulation	)	

PETITION FOR CLARIFICATION OR PARTIAL RECONSIDERATION

TURNER BROADCASTING SYSTEM, INC.

Of Counsel

Bertram W. Carp
Turner Broadcasting System, Inc.
820 First Street, N.E.
Washington, DC 20002
(202) 898-7670

Bruce D. Sokler
Lisa W. Schoenthaler
Mintz, Levin, Cohn, Ferris,
Glovsky & Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 434-7300

It's Attorneys

June 21, 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Sections of	)	
The Cable Television Consumer	)	MM Docket 92-266
Protection and Competition Act	)	
of 1992	)	
	)	
Rate Regulation	)	

PETITION FOR CLARIFICATION OR PARTIAL RECONSIDERATION

Turner Broadcasting System, Inc. ("TBS"), by its attorneys, hereby requests the Federal Communications Commission ("FCC" or "Commission"), pursuant to Section 1.429 of the Commission's rules, to clarify or modify its decision to expressly limit the pass-throughs permitted for the costs of programming obtained from affiliated programmers to the lesser of the annual incremental percentage increase in such costs or the GNP-PI,[1/] while allowing cable operators to pass-through as "external" increases in programming costs of non-affiliated programmers to the extent such costs exceed inflation.[2/] We also ask that the Commission make clear that normal corporate transactions, such as paying dividends to all shareholders, should not figure in adjustments to per channel charges. TBS is a diversified company which operates five national program networks, including the Cable News Network, Headline News, Turner Network Television, the Cartoon Network, and TBS

[1/] 47 C.F.R. § 76.922(d)(2)(vi); Report and Order and Further Notice of Proposed Rulemaking, MM Docket 92-266 at ¶ 252 ("Order").

[2/] 47 C.F.R. § 76.922(d)(2)(i); Order at ¶ 251. Further, adjustments to permitted per channel charges on account of increased programming costs must be reduced to reflect any revenues received by the operator from the programmer. 47 C.F.R. § 76.922(d)(2)(vii).

SuperStation, and is a partial owner and the operator of SportSouth, a regional sports network. TBS has announced plans to launch two additional networks, Turner Classic Movies and CNN-International, the latter of which will provide American viewers' CNN's international feed (of which 4 newscasts each day will be in Spanish).

Introduction

TBS understands that without a limitation on pass-throughs, a cable system could institute an artificial price increase on an affiliated program service, pass through that price increase to consumers, pocket the revenues, and thereby defeat rate regulation.

However, we submit that the risk of an artificial price increase designed to circumvent rate regulation does not exist where a program service is widely carried by cable systems not affiliated with the program service, the nonaffiliated cable systems have also subscribed to the price increase, and the price increase is nondiscriminatory.

Whether the limitation on pass-throughs was intended to apply to broadly distributed networks is unclear. Section 76.922(d)(2)(vi) provides that a definition of "affiliated programmer" for this purpose will be set out in Section 76.901; however, in Section 76.901 the definition is omitted. Therefore, we respectfully request that the Commission clarify that the limitation does not apply where at least one third of the subscribers of a program service are not vertically integrated with the programmer, and where the price increase is applied in a nondiscriminatory manner.

In addition, we respectfully request the Commission to clarify that the limitations of Section 76.922(d)(2)(vii) do not apply to revenues received in the ordinary course of business

by operators as bona fide shareholders in and lenders to cable programming companies. This section provides that operators must adjust per channel charges "to reflect any revenues received by the operator from the programmer" (emphasis supplied).

I. The Provision Limiting the Pass-Through of Programming Costs for Vertically Integrated Programmers Could Effectively Inhibit Such Programmers From Sustaining Programming Improvements and Developing New Services

The FCC's limitation on pass-throughs of increases in the cost of programming obtained from affiliated programmers could impose substantial hardships on affected programmers. As the FCC itself implicitly acknowledges, limiting the pass-through of increased programming costs will cramp an affiliated programmers' continued ability to develop and cable operators' ability to purchase programming.[3/] Discriminating against the broadly distributed "vertically integrated" programmers in reimbursement for programming costs will impose substantial hardships on affected programmers and their cable system investors, and introduce an unneeded regulatory bias into the marketplace for programming.

For example, TNT (a service of Turner Broadcasting) and ESPN (a service of Cap Cities/ABC, Inc.) compete in the marketplace for major sports programming. TNT may be a "vertically integrated" programmer with Time Warner, Inc. and Telecommunications, Inc. ("TCI") for purposes of this proceeding. Time Warner and TCI have six seats on the TBS Board of Directors; approval of these six directors is required for major financial transactions, including large programming acquisitions. TNT and ESPN were the final bidders for cable distribution of Major League Baseball games for the contract period from

---

[3/] Order at ¶ 251.

1990-93; the two networks also split the season of the National Football League's Sunday night cable telecasts, with TNT showing 9 games in the first half of the season (plus 3 pre-season) and ESPN showing 9 games in the second half of the season (plus 3 pre-season).[4/]

Consider the position of TBS cable MSO board members in the next head-to-head competition between ESPN and TNT. If ESPN wins, their cable systems would be able to fully recover any increased programming costs. If TNT wins, programming cost increases above inflation would not be recovered. The cable TBS Directors are placed in a position of direct conflict with our company's interests on perhaps the most important decisions that TBS makes -- programming acquisitions. And the same conflicts will arise where TNT competes for entertainment programming with USA Network, or the new Fox cable network, and others.

The same incentives will affect the TBS investor companies in their dealings as customers of TBS and its competitors. In contract negotiations, they will have powerful incentives to freeze the TBS services in place, while concentrating program improvements in nonintegrated competitors, where the full cost can be recovered. It is true that investors in TBS benefit when the company prospers, but their participation in the net profit (or increased asset value) from program acquisition is unlikely to approach their cable systems' share of the gross cost of the improved programming.

[4/] The NFL Sunday night cable package was created by the NFL specifically for cable distribution. The package does not reduce the number of professional football games broadcast over-the-air but provides cable viewers access to games not previously televised nationally.

The likely result of discriminating against "vertically integrated networks" is that, over time, they will be unable to compete with other networks for programming. This is particularly true since "non-integrated" networks like USA Network, ESPN and the new Fox cable network -- in addition to bidding freely for "premier" programming such as NFL games and the Olympics, also can and in all likelihood will offer exclusivity to cable systems and "discriminate" against delivery systems competing with cable in ways that "vertically integrated" programmers are no longer allowed to do.

These effects strike at the heart of the 1992 Cable Act. By freezing the ability of TBS and other "affiliated programmers" to improve programming, this measure would undermine the paramount policy of increasing diversity in the multichannel video programming market.[5/] At the same time, this limitation would contravene another basic goal of the 1992 Cable Act -- to allow the public to benefit from the development of competition among alternate distributors of programming.[6/]

Congress enacted, and the Commission has implemented, program access provisions which apply only to affiliated programmers, designed to balance the marketplace and to assure multichannel competitors access to valuable programming which the viewing public

---

[5/]See 1992 Cable Act, § 2(b)(1) (it is the policy of Congress to promote the availability to the public of a diversity of views and information through cable television and other video distribution media).

[6/]1992 Cable Act, § 19 (purpose of program access provisions is to increase competition and diversity in the multichannel video programming market).

wants to see at fair, non-discriminatory rates.[7/] A limitation that hinders affiliated programmers would upset this balance.

II. The Provision Requiring Adjustments to Per Channel Charges for Revenues Received by Operators from Programmers Should Exclude Bona Fide Payments to Operators as Lenders and Providers of Equity

The Cable Act does not prohibit cable operators from investing in or lending to cable program services.[8/] We believe that the Commission will agree that so long as such practices are allowed as a matter of public policy, it would be inappropriate to include revenues from repayment of principal and interest, or dividends, or revenues from the sale of equity interests, within the limitations of Section 76.922(d)(vii) so long as these transactions are bona fide, and not undertaken for the purpose of evading the FCC's rate regulations. In particular, such revenues derived from publicly traded companies, such as TBS, should be presumed bona fide.

[7/]First Report and Order, Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-265 at ¶ 21 (released April 30, 1993) (program access requirements were intended to redress the imbalance of power created by vertical integration and horizontal concentration which would otherwise limit competition and restrict consumer choice).

[8/]The Commission does have the authority under Section 11 of the 1992 Cable Act to change this policy.

Conclusion

For the foregoing reasons, the Commission should clarify and reconsider its decision to the extent recommended above, thereby permitting affiliated programming services, consistent with the 1992 Cable Act, to continue to thrive and expand the programming choices available to the public.

Respectfully Submitted,

Bruce D. Sokler /hrs

Bruce D. Sokler
Lisa W. Schoenthaler
Mintz, Levin, Cohn, Ferris,
Glovsky & Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 434-7300

Of Counsel

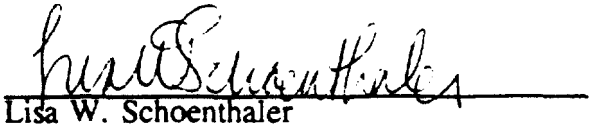
Bertram W. Carp
Turner Broadcasting System, Inc.
820 First Street, N.E.
Washington, DC 20002
(202) 898-7670

June 21, 1993

D16588.1

CERTIFICATE OF SERVICE

I, Lisa W. Schoenthaler, do hereby certify that copies of the foregoing Petition for Clarification or Partial Reconsideration of Turner Broadcasting System, Inc. were served on the following by hand delivery this 21st day of June, 1993.



Lisa W. Schoenthaler

Roy J. Stewart
Chief, Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W., Room 314
Washington, DC 20554

William H. Johnson
Deputy Chief, Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W., Room 314
Washington, DC 20554

Alexandra Wilson
Special Assistant to Chief,
Mass Media Bureau for Cable Television
Federal Communications Commission
1919 M Street, N.W., Room 314
Washington, DC 20554

D16588.1